Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8–32–135–88
EUSOFF CHIN J
6 MAY 1991

Labour Law *— Interpretation of award — Court specially constituted — Whether Industrial Court which heard application for interpretation of award was specially constituted — Whether an application for interpretation of an award is a 'trade dispute' for the purpose of s 22(1) of Industrial Relations Act 1967 — Industrial Relations Act 1967 ss 22(1) & 33(5)*

The applicant had applied to the Industrial Court for an interpretation of art 34 of an Industrial Court award and art 31 of a 1984 collective agreement to both of which award and agreement the applicant and respondent were parties. The application was made under s 33(1) of the Industrial Relations Act 1967 ('the Act'). At the hearing, counsel for the applicant asked whether that Industrial Court was specially constituted to hear the application. The award had been made by a coram whose members were no longer serving in the Industrial Court. Under s 33(5) of the Act, the court which hears the application means the court which made the award or a court specially constituted under s 22 for the purpose. The Industrial Court indicated that it could not hear the application as s 22(1) is for constitution of the court to deal with a trade dispute and not for a case on interpretation. However, it decided that even if it had jurisdiction, it should dismiss the interpretation sought by the union. The applicant applied for an order of certiorari to quash the Industrial Court award and for an order of mandamus directing the Industrial Court to hear and determine the applicant's application for interpretation.

Held, granting the order of mandamus:

(1) Section 33(5) of the Act is not ambiguous. Either the Industrial Court which handed down the award or an Industrial Court specially constituted under s 22 of the Act for the purpose of hearing the application for interpretation, has jurisdiction to entertain the application.

(2) Section 33(5) does not envisage that the President or a member of the Industrial Court which handed down the award which requires interpretation must be appointed or reappointed to the specially constituted court. The President and members of this specially constituted court can consist of entirely new people but, having regard to the words 'specially constituted ... for the purpose' in s 33(5), the minister must express clearly that the court was constituted for the purpose of hearing a specific application made (or referred) to it under s 33(1).

(3) Reading s 33(5) of the Act, it is evident that courts may be constituted in accordance with the provision of s 22(1) of the Act specially to deal with any application made under s 33(1) of the Act. The words 'for the purpose' appearing at the end of the sentence in s 33(5) of the Act must refer to the earlier expression 'for the purpose of this section' which is 'for the purpose of determining the application under s 33(1) of the Act'.

(4) An application for interpretation of an award made under s 33(1) of the Act is a matter referred to or brought to the notice of the Industrial Court under s 52(2) of the Act. Section 52(2) does, in this case, widen the meaning of 'any trade dispute referred to it' found in s 22(1) to include 'any matter referred to or brought to the notice of the court under this Act'.

[Bahasa Malaysia summary

Pemohon telah memohon kepada Mahkamah Perusahaan untuk pentafsiran perkara 34 satu award Mahkamah Perusahaan dan perkara 31 satu persetujuan kolektif 1984. Pemohon dan penentang adalah pihak kepada kedua-dua award dan persetujuan itu. Permohonan itu telah dibuat di bawah s 33(1) Akta Perhubungan Perusahaan 1967 ('Akta itu'). Di pembicaraan, peguambela bagi pemohon membuat pertanyaan sama ada Mahkamah Perusahaan itu telah ditubuhkan khas untuk mendengar permohonan itu. Award itu telah dibuat oleh satu koram yang ahlinya tidak lagi berkhidmat di Mahkamah Perusahaan. Di bawah s 33(5) Akta itu, mahkamah yang mendengar permohonan itu bermakna mahkamah yang membuat award itu atau satu mahkamah yang ditubuhkan khas di bawah s 22 untuk tujuan itu. Mahkamah Perusahaan menyatakan bahawa ia tidak boleh mendengar permohonan itu kerana s 22(1) adalah untuk penubuhan satu mahkamah untuk mengadili satu pertikaian perdagangan dan bukan satu kes berkenaan pentafsiran. Namun demikian, ia membuat keputusan bahawa biarpun ia mempunyai bidang kuasa, ia harus menolak pentafsiran yang diharapkan oleh kesatuan itu. Pemohon memohon untuk satu perintah certiorari untuk membatalkan award Mahkamah Perusahaan itu dan satu perintah mandamus mengarahkan Mahkamah Perusahaan mendengar dan membuat keputusan tentang permohonan pemohon untuk pentafsiran.

Diputuskan, membenarkan perintah mandamus:

(1) Seksyen 33(5) Akta itu tidak kabur. Sama ada Mahkamah Perusahaan yang memberikan award itu atau satu Mahkamah Perusahaan yang ditubuhkan khas di bawah s 22 Akta itu bagi tujuan mendengar permohonan untuk pentafsiran, mempunyai bidang kuasa mendengar permohonan itu.

(2) Seksyen 33(5) tidak menjangka bahawa Yang di Pertua atau ahli Mahkamah Perusahaan yang memberikan award yang memerlukan pentafsiran itu harus dilantik atau dilantik semula untuk menjadi anggota mahkamah yang ditubuhkan secara khas itu. Yang di

Pertua dan ahli mahkamah yang ditubuhkan secara khas itu boleh terdiri seluruhnya daripada ahli baru tetapi, memandangkan perkataan 'specially constituted ... for the purposes' dalam s 33(5), menteri mesti menyatakan dengan jelas bahawa mahkamah itu ditubuhkan bagi tujuan mendengar satu permohonan tertentu yang dibuat (atau dirujuk) kepada mahkamah itu di bawah s 33(1).

(3) Membaca s 33(5) Akta itu, adalah jelas bahawa mahkamah boleh ditubuhkan mengikut peruntukan s 22(1) Akta itu khas untuk mendengar apa-apa permohonan yang dibuat di bawah s 33(1) Akta itu. Perkataan 'for the purpose' yang muncul di akhir ayat dalam s 33(5) Akta itu mesti merujuk kepada ungkapan 'for the purpose of this section' yang lebih awal iaitu 'for the purpose of determining the application under s 33(1) of the Act'.

(4) Satu permohonan untuk pentafsiran satu award yang dibuat di bawah s 33(1) Akta itu adalah satu perkara yang dirujuk kepada atau dibawa kepada perhatian Mahkamah Perusahaan di bawah s 52(2) Akta itu. Seksyen 52(2), di dalam kes ini, melebarkan makna 'any trade dispute referred to it' yang terdapat di dalam s 22(1) untuk meliputi 'any matter referred to or brought to the notice of the court under this Act'.

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 02-119/91.]

Case referred to

1 *Si Rusa Inn Sdn Bhd v National Union of Hotel Bar and Restaurant Workers* [1982] 1 CLJ 262 (distd)

Legislation referred to

Industrial Relations Act 1967 ss 33(1), 35, 52(2)

B Lobo (*Lobo & Associates*) for the appellant.
CV Das (*Shook Lin & Bok*) for the respondent.

Cur Adv Vult

Eusoff Chin J: The applicant had applied to the Industrial Court for an interpretation of art 34 of the Industrial Court Award No 54/1981 and art 31 of a 1984 collective agreement to both of which award and agreement the applicant and the respondent were parties. The application was made under s 33(1) of the Industrial Relations Act 1967 ('the Act'). The Industrial Court fixed the application for hearing on 7 September 1988.

At the commencement of the hearing Encik B Lobo, learned counsel for the applicant, asked whether that Industrial Court was specially constituted to hear the application. He pointed out the provision of s 33(5) of the Act. This is because the Award No 54/1981 was made by a coram consisting of Harun J (as he then was) as the President and three other members all of

whom were no longer serving in the Industrial Court. Section 33 of the Industrial Relations Act 1967 is quoted here for ease of reference, and it states:

> (1) If any question arises as to the interpretation of any award or collective agreement taken cognizance of by the Court, the Minister may refer the question, or any party bound by the award or agreement may apply, to the Court for a decision on the question.
> (2) The Court may, upon the application of any party, by order vary any of the terms of an award, if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty.
> (3) The parties bound by the award or agreement *shall be afforded* a reasonable opportunity of being heard.
> (4) The decision of the Court shall be binding in the same manner as the original award or agreement.
> (5) The expression 'Court' for the purpose of this section, means the Court *by which the award was made* or any other Court *specially constituted under s 22 for the purpose.* (Emphasis added.)

It is alleged in the affidavit of the general secretary of the applicant, that the Industrial Court did not hear a full submission on this issue but having heard briefly the submission of Encik Lobo, the Industrial Court adjourned the hearing. Half an hour after that the Industrial Court informed the applicant that the application for interpretation was 'struck off' and that the written grounds would be supplied later.

On 15 September 1988 the applicant's solicitor received the written award of the Industrial Court. It is Award No 234/1988 dated 9 September 1988.

Having obtained the necessary leave under O 53 r 1 of the Rules of the High Court 1980, the applicant filed this originating motion seeking an order of certiorari to bring forth and quash the Industrial Court Award No 234/1988 dated 9 September 1988, and for an order of mandamus directing the Industrial Court to hear and determine the applicant's application for interpretation according to law.

The Industrial Court in its Award No 234/1988 had not answered directly the preliminary issue raised by Encik Lobo, ie whether the Industrial Court was a specially constituted court under s 33(5) of the Act to hear the application. The bulk of the award dealt with the merits of the application. This is what paras 8 and 9 of the award stated:

> 8 The interpretation sought by the Union against OCBC is brought under s 33 of the Act and sub-s (5) reads as follows:
>
> '(5) The expression "Court" for the purpose of this section, means the Court by which the award was made or any other Court specially constituted under s 22 for the purpose.'

Section 33(5) therefore requires the same quorum as the one which made Award No 54 of 1981. It is now impossible to convene that quorum. The alternative is a court specially constituted under s 22 of the Act for the purpose.

Under s 22, sub-s (1) is for constitution of the court to deal with a trade dispute (not on a case on interpretation). The other subsections make provision

for substitution of panel members, but not of the President. This gives rise to the unusual interpretation that once a President of the Industrial Court has been changed, parties cannot apply for an interpretation under s 33 of the Act, in respect of an award made by a quorum with the ex-President as the presiding officer.

9 By virtue of s 33(5) of the Act, we are of the view that we cannot make an interpretation of Award No 54 of 1981. Even if we can, we are of the view that we should dismiss the interpretation sought by the union.

I think what the Industrial Court meant (by para 9 of the award) was that the court was not a specially constituted court as required by s 33(5) of the Act, and that in view of the circumstances prevailing then, and of what the Industrial Court understood the provisions of s 22 of the Act to mean, it was impossible to constitute a court specially to hear the application for interpretation. In other words, the Industrial Court decided that it had no jurisdiction to hear the application, and that no court could be specially constituted legally to hear the application. But, I believe, because the Industrial Court had also gone into the merits of the application, it decided that even if it could hear the application, it would have dismissed it.

Having perused the award and heard the submissions of Encik B Lobo and Encik CV Das (counsel for the respondent) I came to the conclusion that the Industrial Court had indeed no jurisdiction to hear the application for interpretation, but that part of the award stating that even if the Industrial Court had jurisdiction to hear the application, the Industrial Court would have dismissed it, is certainly premature and made without jurisdiction and must be quashed. I had also granted the order of mandamus directing the application before the Industrial Court to be heard by a specially constituted court in accordance with the provisions of s 33(5) of the Act. The respondent now appeals to the Supreme Court.

When applying for leave to appeal to the Supreme Court Encik CV Das had orally informed me that the respondent was interested in the interpretation of s 33(5) of the Act as there appears to be a lacuna in the Act regarding a specially constituted Industrial Court.

It had not been disputed by both Encik B Lobo and Encik CV Das that the court which handed down the award must interpret the award on an application under s 33(1) of the Act. The question is whether under s 33(5) an Industrial Court can be specially constituted under s 22 of the Act to hear an application under s 33(1) of the Act.

Encik CV Das in support of the Industrial Court's interpretation of s 33(5) and s 22 of the Act stated that s 22 cannot be applied for the purpose of determining an application for interpretation of an award made under s 33(1) of the Act. Section 22 of the Act states:

(1) For the purpose of dealing with any trade dispute referred to it, the Court, except where otherwise provided by this Act, shall be constituted of the President and three members selected by the Minister, one from each of the panels specified in s 21(1).

(2) If any member other than the President is unable to attend or continue to attend any proceedings of the Court or ceases to be a member, the Minister may select another member from the appropriate panel to fill the vacancy.

Encik CV Das submitted that s 22 of the Act clearly dealt with 'any trade dispute referred to' the Industrial Court. An application for an interpretation of an award is not a 'trade dispute' as defined under the Act and that the trade dispute must be one 'referred to the Industrial Court'. He submitted further that under s 22(2), the members only can be changed, but there is no provision for changing or substituting the President of the court.

Encik B Lobo submitted that s 52(2) of the Act would apply. Section 52(2) states:

> The provisions of this Act relating to trade dispute other than the provisions relating to s 26(2) and s 30(4), shall apply to any matter referred to or brought to the notice of the Court under this Act.

Encik Das said that s 52(2) of the Act cannot apply as was so decided in the case *Si Rusa Inn Sdn Bhd v National Union of Hotel Bar and Restaurant Workers.*[1]

I find that s 33(5) of the Act is not ambiguous. Either the Industrial Court which handed down the award or an Industrial Court specially constituted under s 22 of the Act for the purpose of hearing the application for interpretation, has jurisdiction to entertain the application.

The specially constituted court mentioned in s 33(5) must mean an Industrial Court constituted under s 22(1) of the Act. It does not envisage that the President or a member of the Industrial Court which handed down the award which requires interpretation must be appointed or reappointed to the specially constituted court. The President and members of this specially constituted court can consist of entirely new people but, having regard to the words 'specially constituted ... for the purpose' in s 33(5) of the Act, the minister must express clearly that the court was constituted for the purpose of hearing a specific application made (or referred) to it under s 33(1). The provision of s 22(2) does not arise at all except after the court has been specially constituted.

As regards the contention that a court constituted under s 22(1) of the Act has jurisdiction to deal only with any trade dispute referred to it, it would appear to be so if this section is read in isolation. But reading s 33(5) of the Act, it is evident that courts may be constituted in accordance with the provision of s 22(1) of the Act specially to deal with any application made under s 33(1) of the Act. The words 'for the purpose' appearing at the end of the sentence in s 33(5) of the Act must refer to the earlier expression 'for the purpose of this section' which is 'for the purpose of determining the application under s 33(1) of the Act'.

In *Si Rusa Inn Sdn Bhd v National Union of Hotel Bar and Restaurant Workers*,[1] the issue was whether s 52(2) of the Act widens the meaning of 'award' in s 33A of the Act. Hashim Yeop A Sani J (as he then was) held that since s 33A has restricted the word 'award' to 'an award under s 30(1)' of the Act, s 52(2) of the Act does not extend the word 'award' to an order made under s 56 of the Act for non-compliance with a certain article in a collective agreement. That decision cannot be applied here as s 22 of the Act was not the subject matter for interpretation, nor was it argued there.

Section 52(2) of the Act states that the provisions of the Act relating to trade dispute shall apply to any matter *referred to* or *brought to the notice* of

the Industrial Court under the Act. An application for interpretation of an award made under s 33(1) of the Act is a matter referred to or brought to the notice of the Industrial Court under the Act.

Therefore, s 52(2) of the Act does, in this case, widen the meaning of 'any trade dispute referred to it' found in s 22(1) to include 'any matter referred to or brought to the notice of the court under this Act'. But as I have reasoned earlier, by s 33(5), the intention of Parliament is clear in that where the original court which handed down the award can no longer be constituted for whatever reason, the application for an interpretation of an award made under s 33(1) of the Act has to be heard by an Industrial Court specially constituted under s 22(1) of the Act. What it means is that the manner or method of constituting the special court is the same as that provided by s 22 for constituting a court to deal with any trade dispute referred to it.

As regards the argument by Encik B Lobo that he was not given the opportunity under s 33(3) of the Act to fully argue the issue on whether the Industrial Court was a specially constituted court which touches on the jurisdiction of the court to hear the application, I note that the affidavit of the general secretary of the applicant had stated that he was present at the hearing and that there was a brief submission made on that issue before the Industrial Court adjourned for about a half hour followed by the striking out of the application. The notes of the proceedings before the Industrial Court are not placed before me, and I do not know what was said in the brief submission and whether or not the Industrial Court heard learned counsel for both parties before adjourning the sitting. But s 33(3) of the Act requires the Industrial Court to afford a reasonable opportunity of being heard to both the parties, and where such opportunity is not afforded to the parties, the award must be quashed because the Industrial Court would have acted arbitrarily in coming in its decision. Encik Das said there was a brief submission, and I take it that the Industrial Court had complied with the provision of this section.

Since I had issued the order of certiorari to quash part of the award only, I made no order as to costs.

Order accordingly.

Reported by Zarinah Marican